Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,

Petitioners,

v.

CUMBERLAND FARMS, INC., DEMETRIOS HASEOTES, LILY BENTAS, BYRON HASEOTES, GEORGE HASEOTES, ROBERT LANGFORD, JOHN DROLETTE, JAMES MUMMA, APRIL GREEN, PETER PANTAZELOS, WENDY OLSEN, JOHN PECK, RICHARD JENSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., MARGE OLSEN AND HARRIET ANTHONY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes a state appellate court from dismissing claims against nondebtor officers and employees of a debtor corporation, for the sole reason that the claimants filed proofs of claim in the bankruptcy court which had forever barred and discharged all claims against the nondebtor officers and employees of the debtor corporation.

2. Whether the Due Process Clause and the Anti-Injunction Act preclude a Massachusetts state court from dismissing claims of plaintiffs for the reason that a federal district court in New Jersey has enjoined them from prosecuting their claims on the grounds that they were members of a mandatory non-opt out class, where they had exercised their right to exclude themselves from a Rule 23(b)(3) class action.

3. Whether the Due Process Clause precludes a Massachusetts appellate court from depriving a plaintiff, who was ordered to pay defendants $34,661.56 for filing a frivolous complaint, of her right to appeal the judgment dismissing the complaint, where the trial court ordered that the plaintiff could recover the $34,661.56 if she prevailed on appeal and a Massachusetts statute provides the right to appeal.

4. Whether the Equal Protection Clause of the Fourteenth Amendment precludes a Massachusetts appellate court from dismissing the appeal of a superior court judgment for the sole reason that a bankruptcy court has barred claims against nondebtor defendants in the lawsuit, where the debtor is not a defendant and where a Massachusetts statute provides that parties aggrieved by a decision of a superior court have the right to appeal.

LIST OF PARTIES

Petitioners Cheryl Adams, Richard Waugh, Brent Adams, Ronald Ring, Patricia Adams, Robert Ravitz, Carrie Burke, Weldon Adams, Elizabeth Targee, Tina Levesque and Melissa Smith Rapa respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in this proceeding on January 23, 1997.

TABLE OF CONTENTS.

Questions presented i
List of parties ii
Opinions below 1
Jurisdiction 2
Constitutional and statutory provisions involved 2
Statement of the case 3
Reasons for granting the writ 7

I. Depriving the petitioners of their day in court to prosecute their claims against non-debtor defendants, for the sole reason that they exercised their right to file a proof of claim in a bankruptcy court, violates the Due Process Clause 7

II. The *Curley* Court could not enjoin the petitioners from prosecuting their claims in a Massachusetts state court, where they were never parties in the *Curley* case and they opted out of the *Curley* Rule 23(b)(3) class action as the *Curley* Court determined they could 9

III. The Supreme Judicial Court of Massachusetts deprived Cheryl Adams of her right to appeal the judgment ordering her to pay the defendants $34,661.56, thereby depriving her of that property without granting her the process guaranteed by the Fourteenth Amendment 10

IV. The Equal Protection Clause precludes a Massachusetts appellate court from depriving persons who file proofs of claim in a bankruptcy court from appealing adverse judgments where a Massachusetts statute grants that right to all other persons 10

TABLE OF CONTENTS (CONT'D)

Conclusion 11
Appendix 13

TABLE OF AUTHORITIES CITED.

CASES.

Board of Pardons v. Allen, 482 U.S. 369 (1987) 11
Celotex Corp. v. Edwards, 115 S.Ct. 1493 (1995) 8
Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) . 9
Evitts v. Lucey, 469 U.S. 387 (1985) 11
Hansberry v. Lee, 311 U.S. 32 (1940) 9
Honda Motor Co., Ltd. v. Oberg, 114 S.Ct. 2331 (1994) 10
In re Oliver, 333 U.S. 257 (1948) 10
Ins. Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982) 9
Kokkonen v. Guardian Life Ins. Co. of America, 114 S.Ct. 1673 (1994) 9
Lindsey v. Normet, 405 U.S. 56 (1972) 11
Little v. Streator, 452 U.S. 1 (1981) 8
Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986) 8
Martin v. Wilkes, 490 U.S. 755 (1989) 7
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) . 9
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 8

TABLE OF AUTHORITIES CITED (CONT'D)

TXO Production Corp. v. Alliance Resources, 113 S.Ct. 2711 (1993) 10

Zinermon v. Burch, 494 U.S. 113 (1990) 11

STATUTES AND RULES.

United States Constitution

Fourteenth Amendment . . . . . i, 2, 10

United States Code

28 U.S.C. § 1257 2
28 U.S.C. § 2283 2

Massachusetts General Laws.

c. 231, § 113 . . . . . 3, 10, 11

No.

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CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,

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CUMBERLAND FARMS, INC., DEMETRIOS HASEOTES, LILY BENTAS, BYRON HASEOTES, GEORGE HASEOTES, ROBERT LANGFORD, JOHN DROLETTE, JAMES MUMMA, APRIL GREEN, PETER PANTAZELOS, WENDY OLSEN, JOHN PECK, RICHARD JENSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., MARGE OLSEN AND HARRIET ANTHONY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Suffolk County Superior Court dismissed the petitioners' claims in *Cheryl Adams* v. *Cumberland Farms, Inc., et al.*, No. 91-231 (Essex) and in *Richard Waugh, et al.* v. *Demetrios Haseotes, et al.*, No. 93-2663, on July 11, 1995 without issuing an

opinion. On July 17, 1995, it ordered judgment for the defendants, dismissing Petitioner Cheryl Adams' claims in *Cheryl Adams* v. *Kevin Burke, et al.*, No. 94-0627, and ordered her to pay the defendants $34,661.56 in attorney's fees and costs in an unreported opinion. (A. A). The Supreme Judicial Court of the Commonwealth of Massachusetts dismissed the petitioners' appeals in *Cheryl Adams, et al.* v. *Cumberland Farms, Inc., et al.*, No. SJC-07294, on January 23, 1997 without issuing an opinion.

JURISDICTION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on January 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> *** nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Title 28 United States Code § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

3. Massachusetts General Laws, c. 231, § 113 provides in pertinent part:

> A party aggrieved by a final judgment of the superior court *** may appeal therefrom *** .

STATEMENT OF THE CASE

Procedure: #203-5, TERMINATION OF EMPLOYEES, promulgated in 1972 and never rescinded, spelled out the Cumberland Farms policy of making up for inventory losses by having Cumberland Farms, Inc. ("CFI") loss prevention specialists plan with area supervisors to obtain confessions from employees. It required CFI supervisors to terminate managers who could not control inventories unless the manager could show that the inventory was affected by a subordinate who confessed to dishonesty.

The Director of the CFI Loss Prevention Department directed the interrogation of approximately 40,000 employees and the production of confessions from more than 20,000. His 1985 Memorandum Re: Productivity, Standards and Job Requirements — never rescinded — required each loss prevention specialist to produce an absolute minimum of 30 interrogations per month. He made it clear that interrogations are the primary responsibility and that CFI does not have the luxury of investigation.

A CFI agent, without evidence of her wrongdoing and without reason to suspect her, interrogated Cheryl Adams for four hours and twenty minutes on February 8, 1989. He talked about loss prevention, about stealing. He said CFI has done a long investigation of you. Then he said he knew of her divorce, that she had a son and there was a possible custody battle. He said this won't help your case.

Then he said he was there to help her; that if she cooperated, everything would get cleared up right now or it could be done at

the police station. He said it's our word against yours and we always win. He went over her *Miranda* rights. He told her she had the right to leave, but if she did it would be turned over to the police; that she faced jail and would lose custody of her son.

Everything would be all right, he said, if she wrote out a statement. He dictated every word of a four-page confession to stealing $11,895. The confession was almost word-for-word identical to a 1969 form confession and to over 20,000 confessions dictated by CFI agents to CFI employees.

CFI records show that Adams was the 37,139th employee interrogated. Approximately 25 confessions a week were obtained from CFI employees until June of 1990, when reports of the existence of the scheme were disseminated in the media.

On April 27, 1989, Cheryl Adams pleaded guilty to larceny over $250 from CFI. The Ipswich District Court sentenced her to five years probation, contingent on her paying restitution to CFI of $5500. It allowed her motion for a new trial on December 27, 1990.

In January of 1991 Adams filed *Adams* v. *Cumberland Farms, Inc.*, Essex County Superior Court, No. 91-231. The crux of her complaint was that the defendant officers and employees of CFI carried out a scheme by which low-level employees were wrongfully accused of stealing and coerced into signing confessions through threats, including that of being arrested. The defendants removed the case to the United States District Court for the District of Massachusetts, No. 91-10627-S, based on her federal RICO Act claim.

On January 24, 1992, a jury found Adams not guilty of the sole charge against her, larceny over $250.

Adams moved to amend her lawsuit into a class action in March of 1992 and to add as plaintiffs ten other former CFI employees, petitioners in this case. A hearing on the motion to

amend was scheduled for Monday, May 4, 1992. On Friday, May 1, 1992, CFI filed a chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts, *In re CFI*, No. 92-41305-JFQ. As a result, proceedings were stayed in *Adams* v. *CFI*. The petitioners, 11 putative plaintiffs in *Adams* v. *CFI*, filed a class proof of claim in the bankruptcy case.

The district court vacated the automatic stay as to the non-debtor defendants on June 17, 1992 (A. B), and remanded the case to the superior court on July 29, 1992.

The petitioners filed a class action lawsuit in May of 1993 in Suffolk County Superior Court, *Richard Waugh, et al.* v. *Demetrios Haseotes, et al.*, No. 93-2663, alleging they were wrongfully accused of stealing by these defendants and suffered harm as a result. They did not name CFI as a defendant.

On December 24, 1986, former CFI employees filed a class action lawsuit in the United States District Court for the District of New Jersey, *Curley* v. *CFI*, No. 86-5057. On June 22, 1993, the *Curley* parties reached a preliminary settlement. Terms of the settlement included: 1) a class would be certified for settlement purposes consisting of former CFI employees who were the subject of questioning or attempted questioning from October 15, 1970, the date the RICO Act went into effect, until May 1, 1992; and 2) the parties would seek approval from the bankruptcy court for a mandatory non-opt out class consisting of all individuals who filed proofs of claim related to CFI's loss prevention practices.

On July 10, 1993, the petitioners moved to intervene in the *Curley* case as plaintiffs. The *Curley* court denied the motion for the reason that the class was a Rule 23(b)(3) class and the petitioners could opt out of the class (A. C). They opted out of the class in valid and timely fashion on August 27, 1993.

On August 30, 1993, the bankruptcy court approved a joint motion by the debtor, CFI, and the *Curley* plaintiffs for a

mandatory non-opt out class of former CFI employees who filed proofs of claim in *In re CFI*. The order stated: "Approval is not given on the merits. The court merely approves the procedure under which approval is determined by the district judge." (A. D). The petitioners filed a notice of appeal.

The *Curley* court issued a Final Order and Judgment approving the class settlement on September 8, 1993. The order stated: "1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class." (A. E). On July 18, 1994, the *Curley* Court authorized payment to the class from the settlement fund.

On August 17, 1993, the superior court ordered the *Adams* v. *CFI* case consolidated with the *Waugh* v. *Haseotes* case. The court ordered proceedings stayed in the two consolidated cases on December 31, 1993 pending a decision on the appeal of the August 30, 1993 bankruptcy court order.

Adams filed *Cheryl Adams* v. *Kevin Burke, et al.*, Suffolk County Superior Court, No. 94-0627, on February 7, 1994. She alleged that the defendants conspired with prosecutors and attorneys to violate her civil rights. She provided evidence, uncontroverted by the defendants, of justice being obstructed to find her guilty of stealing $11,895 from CFI, a crime the defendants knew she did not commit. Adams presented evidence of the defendants fabricating a $60 cash audit, of mutilating documents, of suborning perjury about "Precious" diapers, and of hiding material witnesses April Green and Wendy Olsen.

The respondents filed a motion on July 5, 1995 to dismiss the petitioners' claims in *Adams* v. *CFI* and *Waugh* v. *Haseotes*, based on the petitioners being members of the *Curley* settlement class. The superior court allowed the motion and entered judgment for the respondents on July 11, 1995 without issuing an opinion.

The superior court entered judgment for the respondents in *Adams* v. *Burke* on July 17, 1995. (A. A). It ordered Cheryl Adams to pay the respondents $34,661.56 in attorney's fees and costs for the reason that she knew she was enjoined by the *Curley* Court from prosecuting her claims and that her claims were wholly insubstantial, frivolous and not advanced in good faith.

The United States District Court for the District of Massachusetts affirmed the order of the bankruptcy court on June 7, 1995 in *Cheryl Adams, et al.* v. *CFI*, No. 93-40187. The First Circuit affirmed that order in No. 95-1736 on May 6, 1996. On November 4, 1996, this Court denied the petition for a writ of certiorari, No. 96-300.

On November 14, 1996, the respondents moved for dismissal of the petitioners' appeals in the Supreme Judicial Court of the Commonwealth of Massachusetts in *Cheryl Adams, et al.* v. *Cumberland Farms, Inc., et al.*, No. SJC-07294, on the grounds that further appeal had been rendered moot by this Court's denial of the petition for certiorari. The Supreme Judicial Court dismissed the petitioners' appeals on January 23, 1997 without issuing an opinion.

REASONS FOR GRANTING THE WRIT

I. DEPRIVING THE PETITIONERS OF THEIR DAY IN COURT TO PROSECUTE THEIR CLAIMS AGAINST NON-DEBTOR DEFENDANTS, FOR THE SOLE REASON THAT THEY EXERCISED THEIR RIGHT TO FILE A PROOF OF CLAIM IN A BANKRUPTCY COURT, VIOLATES THE DUE PROCESS CLAUSE.

This Court has asserted that our deep-rooted historic tradition mandates that everyone should have his own day in court. *Martin* v. *Wilkes*, 490 U.S. 755, 762 (1989). Even though the

defendants have not denied a single fact alleged by the plaintiffs, the plaintiffs have yet to have their day in court.

The Massachusetts Supreme Judicial Court deprived the plaintiffs of their day in court when it allowed the defendants' motion to dismiss based solely on the bankruptcy court's order mandating that the plaintiffs be members of a non-opt out class in the *Curley* case. In this case the plaintiffs' claims were against these non-debtor defendants, not against the debtor, CFI. The outcome of the plaintiffs' claims against the non-debtors could not conceivably have any effect on the estate of the debtor, CFI. The proceedings against the non-debtor defendants are thus not related to the bankruptcy. *Celotex Corp.* v. *Edwards*, 115 S.Ct. 1493, 1499 (1995). In addition, the U.S. District Court for the District of Massachusetts vacated the automatic stay as to the non-debtor defendants, allowing these plaintiffs to prosecute their claims. Thus, the judgment of the Supreme Judicial Court, based on the bankruptcy court order, erred in stripping the plaintiffs of an opportunity to be heard, violating their right of due process. *Little* v. *Streator*, 452 U.S. 1, 3 (1981).

The New Jersey district court denied the petitioners' motion to intervene in the *Curley* v. *CFI* class action lawsuit as plaintiffs for the reason that they could exclude themselves from the class. They excluded themselves in valid and timely fashion. They were never parties in the *Curley* case. They are therefore not bound by the Final Order and Judgment in the *Curley* case. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974).

The settlement, agreed to by the *Curley* parties and approved by the *Curley* Court and by the bankruptcy court in which CFI filed its chapter 11 petition, cannot dispose of the valid claims of these petitioners. *Local Number 93* v. *City of Cleveland*, 478 U.S. 501, 529 (1986).

Procedural due process requires that these plaintiffs, deprived of their rights to clear their names and to recover dam-

ages for the harm inflicted on them by the defendants, be afforded appellate review. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20 (1991).

II. THE *CURLEY* COURT COULD NOT ENJOIN THE PETITIONERS FROM PROSECUTING THEIR CLAIMS IN A MASSACHUSETTS STATE COURT, WHERE THEY WERE NEVER PARTIES IN THE *CURLEY* CASE AND THEY OPTED OUT OF THE *CURLEY* RULE 23(b)(3) CLASS ACTION AS THE *CURLEY* COURT DETERMINED THEY COULD.

The U.S. District Court for the District of New Jersey lacked jurisdiction over the person of these plaintiffs, who were never parties in the *Curley* case. *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). It lacked subject matter jurisdiction over them where they opted out of the Rule 23(b)(3) class action. The Massachusetts Supreme Judicial Court therefore violated the due process rights of the plaintiffs when it ascribed to the *Curley* Court the binding force and validity of its orders and judgments. *Ins. Corp. of Ireland* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 (1982).

The Anti-Injunction Act, 28 U.S.C. § 2283, precluded the *Curley* Court from enjoining proceedings in the Massachusetts state courts where no act of Congress authorized an exception, and there is no need, having had its final order affirmed and having issued its distribution order, to enjoin proceedings to aid its jurisdiction or to protect its judgment. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146 (1988). A federal district court lacks jurisdiction over a state-law claim in a state court when jurisdiction is not essential to the conduct of federal-court business. *Kokkonen* v. *Guardian Life Ins. Co. of America*, 114 S.Ct. 1673, 1677 (1994).

III. THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DEPRIVED CHERYL ADAMS OF HER RIGHT TO APPEAL THE JUDGMENT ORDERING HER TO PAY THE DEFENDANTS $34,661.56, THEREBY DEPRIVING HER OF THAT PROPERTY WITHOUT GRANTING HER THE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Denying review of the judgment requiring Cheryl Adams to pay the defendants $34,661.56 and interest violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Honda Motor Co., Ltd.* v. *Oberg*, 114 S.Ct. 2331, 2340 (1994). The purpose of the Due Process Clause is to prevent such arbitrary deprivations of liberty or property. *Id.* at 2342. Adams' liberty and property interests should not be forfeited until there has been a fair trial in a public tribunal. *In re Oliver*, 333 U.S. 257, 278 (1948). Procedural due process requires judicial review of punitive damage awards. *TXO Production Corp.* v. *Alliance Resources*, 113 S.Ct. 2711, 2727 (1993).

IV. THE EQUAL PROTECTION CLAUSE PRECLUDES A MASSACHUSETTS APPELLATE COURT FROM DEPRIVING PERSONS WHO FILE PROOFS OF CLAIM IN A BANKRUPTCY COURT FROM APPEALING ADVERSE JUDGMENTS WHERE A MASSACHUSETTS STATUTE GRANTS THAT RIGHT TO ALL OTHER PERSONS.

Section 113 of chapter 231 of the Massachusetts General Laws affords these plaintiffs the right to appeal the judgment of the superior court dismissing their claims. Where section 113 provides such a right, it cannot be granted to some and arbitrarily denied to these plaintiffs for the reason that they filed a proof of claim in a bankruptcy court without violating the Equal Protection Clause. *Lindsey* v. *Normet*, 405 U.S. 56, 57

(1972). Appellate courts must apply the rules governing appellate review in a way that provides a fair opportunity to obtain an adjudication on the merits of an appeal. *Evitts* v. *Lucey*, 469 U.S. 387, 405 (1985).

The language of section 113 creates a presumption that the plaintiffs can appeal from the superior court judgment, and thus a liberty interest is created which is protected by the Due Process Clause as well as by the Equal Protection Clause. *Board of Pardons* v. *Allen*, 482 U.S. 369, 381 (1987). This Court has determined that the Fourteenth Amendment provides the protection of a guarantee of fair procedure. *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990).

CONCLUSION.

For these reasons, a writ of *certiorari* should issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Appendix A
Findings Assessing Attorneys' Fees and Order for Judgment 1A

Appendix B
Order on Motion for Preliminary Injunction and Vacation of Stay 4A

Appendix C
Opinion of the United States District Court for the District of New Jersey 5A

Appendix D
Order Authorizing and Approving Joint Motion for Approval of a Non-opt Settlement Class and for Approval of Class Settlement of Loss Prevention Claims 8A

Appendix E
Final Order and Judgment 10A

Appendix F
Order 13A

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 94-0627-B

CHERYL ADAMS,
Plaintiff

vs.

CUMBERLAND FARMS, INC. & others,
Defendants

FINDINGS ASSESSING ATTORNEYS' FEES
and ORDER FOR JUDGMENT

Pursuant to this court's order, dated June 8, 1995, on defendants' motion to dismiss and for attorney's fees, a hearing was held on July 11, 1995. The purpose of the hearing was: (1) to determine the reasonableness of the attorney's fees and costs requested by defense counsel; and (2) to afford plaintiff, Cheryl Adams, an opportunity to testify in opposition to the motion to assess fees and costs against her pursuant to G.L. c. 231, § 6F. Ms. Adams did not appear at the hearing. Her attorney, Stanley Cohen, advised the court that he had discussed the court's decision with her and that she chose not to appear in court because of a scheduled camping trip. Attorney Cohen advised the court that it was Ms. Adams' wish that he continue to represent her in this matter. Also, Attorney Cohen advised the court that while neither he nor Ms. Adams contested the reasonableness of the fees and costs requested by the defend-

ants, they insist that no fees or costs should be awarded because this action is meritorious and was brought in good faith. After considering the arguments of counsel, the court now makes the following findings and rulings.

The claims asserted by Ms. Adams in this case "were wholly insubstantial, frivolous and not advanced in good faith." She brought this action knowing that she had been enjoined by the U.S. District Court for the District of New Jersey from prosecuting this action. She also knew the claims against the defendants other than Cumberland Farms, Inc. were frivolous. Under these circumstances, Ms. Adams is also liable for reasonable attorneys' fees and costs pursuant to G.L. c. 231, § 6F.

Counsel seeks an award of attorneys' fees in the amount of $32,081 and costs of $2,580.56. The court has reviewed the record in this case, including the affidavits in support of the requested award of attorneys' fees. Although the assessment of a reasonable award of attorneys' fees is largely discretionary, some of the factors that should be taken into consideration are "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by attorneys in the area, and the amount of awards in similar cases." *Linthicum* v. *Archambault*, 379 Mass. 381, 388-389 (1979), citing *Darmetko* v. *Boston Housing Authority*, 378 Mass. 758, 763-764 (1979). After considering these relevant factors, the court finds the requested award of attorneys' fees to be extremely reasonable. The court also finds that the costs incurred are reasonable. Therefore, the court hereby finds that a reasonable award of attorneys' fees in this case is $32,081.00 and that a reasonable award of costs is $2,580.56.

Accordingly, the court orders the entry of the following judgment:

Judgment for Cumberland Farms, Inc., Lilly Bentas, James Mumma, John Drolette, Robert Langford, Marge Olsen, Wendy Olsen, Timothy O'Brien, Philip Moss, Moss, McGill & Bachelder, P.A., Robert Smith, Nicholas McClear and Wilentz, Goldman & Spitzer, P.C. against Cheryl Adams and Attorney Stanley R. Cohen, jointly and severally, for attorneys' fees of $32,081.00 plus costs of $2,580.56[1]

/s/_____
Patrick J. King
Justice of the Superior Court

DATED: July 12, 1995

[1] At the July 11, 1995 hearing, Attorney Moss advised the court that Attorney Cohen had filed yet a sixth lawsuit in Federal Court raising the same claims as are raised in the instant action. Pursuant to the request of Attorney Moss, a copy of the court's decision in this case will be forwarded to the Board of Bar Overseers of the Commonwealth of Massachusetts.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHERYL ADAMS, et al
Plaintiffs

v.

CIVIL ACTION
NO. 91-10627-S

CUMBERLAND FARMS, INC., et al
Defendants

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND VACATION OF STAY

June 17, 1992

SKINNER, D.J.

The plaintiffs seek preliminary injunction to prevent the transfer of the assets of the individual defendants (the corporate defendant having filed for bankruptcy). The plaintiffs have not submitted evidence comparable to that which would be required for an attachment or which would satisfy the requirement of a showing of immediate, irreparable harm necessary for the issuance of a preliminary injunction. Furthermore, the ambiguity of the evidence casts doubt on whether the plaintiffs are likely to succeed on the merits. Accordingly, the motion for preliminary injunction is *denied*.

The stay heretofore entered is *vacated* with respect to the individual defendants.

/s/_____
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LANCE CURLEY, et al.,
Plaintiffs,

Civil Action
No. 86-5057 (SSB)

v.

CUMBERLAND FARMS, INC., et al.,
Defendants.

CHERYL ADAMS, RONALD RING, RICHARD WAUGH, BRENT ADAMS, CARRIE BURKE, PATRICIA ADAMS, ELIZABETH TARGEE, MELISSA SMITH RAPA, ROBERT RAVITZ, NANCY FRENCH, WELDON ADAMS, TINA LEVESQUE, WILLIAM CONNORS, AND MATTHEW VAN WINKLE,
Applicants for
Intervention

This matter having come before the court on the motion of Cheryl Adams, *et al.*, to intervene as plaintiffs, for leave to allow plaintiff subclasses, to order that appropriate notice be provided putative class members and to order the ascertainment of the defendants' net worth;

The court having considered the submissions of the parties;

The court finding that the proposed settlement this court preliminarily approved in its order of July 28, 1993 provides ample opportunity for Adams, *et al.* to "opt-out" of the proposed class in this matter; *see* July 28, 1993 Order ¶ 9; *see also* Fed. R. Civ. P. 23(b)(3), 23(c)(2); and

The court further finding that the proposed settlement this court preliminarily approved in its order of July 28, 1993 provides ample opportunity for Adams, *et al.*, to raise any objections they may have to the terms and procedure of the settlement; *see* July 28, 1993 Order ¶¶ 6-7; and

The court further finding that there is no evidence that plaintiffs' counsel in this matter have failed to fulfill their duty to class members, including Adams, *et al.*, or have colluded in any way with counsel for the defendants; *cf.* Transcript of June 22, 1993 Hearing at 23 (court notes the "extraordinarily hard work on both sides for reaching . . . a fair compromise under all of the circumstances" and describes the case as "a long, long battle"); and

It appearing that intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2)[1] is unavailable where, as in this case, a proposed class settlement neither impairs nor impedes the applicants' ability to protect their interests, in that the applicants have the opportunity to exclude themselves from the settlement, *see Woolen* v. *Surtran Taxicabs, Inc.*, 684 F.2d 324, 334 (5th Cir. 1982); *Shore* v. *Parklane Hosiery Co.*, 606 F.2d 354, 357 (2d Cir. 1979), or to oppose the settlement through objections, *see id.*, and where the interests of the class are being adequately represented, *see Woodland Private Study Group* v. *State of New Jersey*, 616 F.Supp. 794, 799 (D.N.J. 1985), *vacated on other grounds*, 846 F.2d 921 (3d Cir. 1988);

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[1] Rule 24(a)(2) provides in relevant part:

> Upon timely application anyone shall be permitted to intervent in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

IT IS on this 11th day of August 1993 hereby

ORDERED that the motion of Cheryl Adams, *et al.*, is DENIED.

No costs.

/s/_____

Stanley S. Brotman
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

IN RE:

CUMBERLAND FARMS, INC.,

DEBTOR.

CHAPTER 11

CASE NO.
92-41305-JFQ

ORDER AUTHORIZING AND APPROVING JOINT MOTION FOR APPROVAL OF A NON-OPT SETTLEMENT CLASS AND FOR APPROVAL OF CLASS SETTLEMENT OF LOSS PREVENTION CLAIMS

AFTER DUE NOTICE of and hearing on the Joint Motion ("Joint Motion") by Debtor and the Curley Plaintiffs, as defined in the Joint Motion, For Approval of a Non-opt Out Settlement Class and For Approval of a Class Settlement of Loss Prevention Claims and due cause appearing to me therefore, it is hereby

FOUND that notice of the Joint Motion was sufficient and proper; and it is further

FOUND that the relief requested is in the best interest of the Debtor's estate and its Creditors,

NOW THEREFORE is is hereby

ORDERED that the Joint Motion is granted and approved in all respects * contingent upon the final approval of the settlement in the case styled *Lance Curley, et al.* v. *Cumberland*

* Approval is not given on the merits. The court merely approves the procedure under which approval is determined by the district judge.

Farms, Inc., et al. ("Curley Case"), currently pending in the United States District Court for the District of New Jersey, Civil Action No. 86-5057(SSB) on the terms and conditions set forth in Exhibit A to the Joint Motion or on terms and conditions substantially similar thereto; and it is further

ORDERED that the Debtor may execute whatever documents are necessary to evidence the settlement and carry out the terms of this Order; and it is further

ORDERED that upon final approval of the settlement in the Curley Case, any claim brought by or which could have been brought by any of the individuals who filed LPD Bankruptcy Claims, as defined in the Joint Motion, against the Debtor, its affiliates and/or their predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), their past or present owners, officers, directors, employees, agents, including without limitation attorneys retained to represent or who have represented the Debtor and/or its employees in the loss prevention matters, insurers and/or named insureds based upon, arising out of or in any way related to the individual's employment, including termination of employment with Cumberland, shall be forever barred and discharged; and it is further

ORDERED that in the event that the settlement in the Curley Case is not approved by final order, including all appeals thereto, or if the settlement is terminated by the defendants in the Curley Case pursuant to the terms of the settlement, this Order shall be null and void without further force and effect.

Signed this 30th day of August, 1993 at Worcester.

/s/_____

The Honorable James F. Queenan, Jr.
Chief United States Bankruptcy Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LANCE CURLEY, et al.,
Plaintiffs,

vs.

Civil Action No.
86-5057 (SSB)

CUMBERLAND FARMS, INC.,
Defendants.

FINAL ORDER AND JUDGMENT

On July 28, 1993, this Court preliminarily approved the Proposed Settlement and entered an Order conditionally certifying, for settlement purposes only, a class composed of:

> All persons employed at any convenience store or gasoline station owned or operated by Cumberland Farms, Inc. who were, at any time from October 15, 1970 through May 1, 1992, the subject of questioning or attempted questioning by field agents of Cumberland Farms Loss Prevention Department (formerly known as the Security Department) and who suffered injury as a result (the "Class");

By that Order, this Court also scheduled a hearing to be held on September 8, 1993, at 9:30 A.M. in Courtroom 2 of the United States Courthouse, 401 Market Street, Camden, New Jersey: (i) to determine whether the Proposed Settlement is fair, reasonable and adequate and in the best interests of the Class; (ii) to

determine whether final judgment should be entered thereon dismissing all claims and causes of action between the Class and the defendants on the merits, with prejudice, and without costs; (iii) to consider the applications of plaintiffs' counsel for awards of attorneys' fees, costs and disbursements; and (iv) any other matters the Court may deem appropriate.

On September 8, 1993, a hearing was held in accordance with the terms of this Court's July 28, 1993, Order, at which time all interested persons were afforded the opportunity to be heard. This Court has considered all of the submissions and arguments presented with respect to the Proposed Settlement and upon consideration thereof, this Court FINDS, CONCLUDES, ADJUDGES and DECREES as follows:

1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This Order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class and do not withdraw their requests for exclusion by the time the Court authorizes payment to the Class from the Settlement Fund.

2. The Court hereby confirms its Order dated July 28, 1993 and certifies this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

3. The Proposed Settlement, as embodies by the transcript of Settlement made before the Honorable Magistrate Judge Rosen on June 22, 1993 is fair, reasonable and adequate, is in the best interest of the Class and is approved.

4. The notification provided for and given to the Class is the best notice practicable under the circumstances and is in full compliance with the requirements of due process and of Rule 23 of the Federal Rules of Civil Procedure.

5. This Court hereby enters Final Judgment in this action dismissing all claims and causes of actions between the Class and the defendants, on the merits, with prejudice and without

costs, in accordance with the terms of the Settlement. All claims which were asserted or which could have been asserted in the *Curley* litigation by plaintiffs and/or any Class member against Cumberland Farms, its affiliates and/or its predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), or any of its past or present owners, directors, officers, employees, agents, attorneys, insurers or named insurers (the "Released Parties"), arising out of or in any way related to the Class Members' employment, including termination at Cumberland, will be extinguished forever.

6. All plaintiffs, and members of the Class, whether or not they have filed lawsuits, their heirs, executors, administrators, successors, and/or assigns are forever barred and enjoined from instituting or prosecuting either directly or indirectly any action against the Released Parties arising out of or in any related to the Class member's employment, including termination at Cumberland.

7. The Released Parties release any claim, action, cause of action, or demand of whatever kind against the Class members.

8. Without affecting the finality of this Judgment, this Court hereby reserves and retains continuing jurisdiction to order performance of the Settlement, including, but not limited to, the award of attorneys' fees, costs and expenses to Class counsel, the approval or rejection of any claim filed by Class members, and the distribution of the proceeds of the Settlement in accordance with the Stipulation. Except for the disbursements made in accordance with this Court's Order awaiting attorneys' fees and reimbursement of expenses, no disbursements from the Settlement Fund shall be made except upon further Order of this Court.

Dated: September 8, 1993

STANLEY S. BROTMAN
United States District Judge

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth

In the case No. SJC-07263
and
SJC-07294

CHERYL ADAMS & others

vs.

CUMBERLAND FARMS, INC. & others
(and two consolidated cases)

pending in the Supreme Judicial Court for the county of Suffolk, Nos. SJ-96-0268 and SJ-96-0477

ORDERED, that the following entry be made in the docket; viz. —

Appeal dismissed.

By the Court,

/s/_____
Jean M. Kennett, Clerk

January 23, 1997

Supreme Court, U.S.
FILED
JUN 2 1997
CLERK

No. 96-1782

In The

Supreme Court of the United States

October Term, 1996

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE and MELISSA SMITH RAPA,
Petitioners,

vs.

CUMBERLAND FARMS, INC., DEMETRIOS HASEOTES, LILY BENTAS, BYRON HASEOTES, GEORGE HASEOTES, ROBERT LANGFORD, JOHN DROLETTE, JAMES MUMMA, APRIL GREEN, PETER PANTAZELOS, WENDY OLSEN, JOHN PECK, RICHARD JENSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., MARGE OLSEN and HARRIET ANTHONY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE

Respondent Cumberland Farms, Inc. has no parent company nor any wholly or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Corporate Disclosure	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. Procedural History	1
B. Statement of Facts	2
Reasons for Denying the Writ	5
I. As A Result Of The Final Judgment In *Curley*, And This Court's Denial Of Certiorari In No. 96-300, Petitioners' Claims Against The Respondents Are Barred By The Doctrine Of *Res Judicata.*	6
A. The Decisions Of The First And Third Circuits Are Final Decisions On The Merits Of Petitioners' Claims.	6
B. The Petitioners And Respondents Are All Parties To The Final Order And Judgment In The *Curley* Case.	7
C. Three Of The Issues Stated In The Petition Were, Or Could Have Been Litigated In The Prior Proceedings, And The Fourth Issue Is Moot.	8

Contents

	Page
II. The Dismissal Of Petitioners' Appeals By The Massachusetts Appellate Courts Did Not Implicate Any Constitutional Rights.	11
Conclusion	13

TABLE OF CITATIONS

Cases Cited:

Adams v. Cumberland Farms, Inc., 86 F.3d 1146 (1st Cir. 1996)	4, 6
Adams, et al. v. Cumberland Farms, Inc., No. 96-300, *cert. denied*, 65 U.S.L.W. 3334 (U.S. Nov. 4, 1996)	3, 4, 6
Curley v. Cumberland Farms, Inc., 27 F.3d 556 (3rd Cir. 1994)	4, 6
Curley v. Cumberland Farms Dairy, Inc., 47 F.3d 1160 (3rd Cir. 1995)	5, 7
Dunbrack v. Commonwealth, 398 Mass. 502, 498 N.E. 2d 1056 (Mass. 1986)	12
DuPont v. Superior Court, 401 Mass. 122, 514 N.E. 2d 1086 (Mass. 1987)	11
Hadfield v. Commonwealth, 387 Mass. 252, 439 N.E. 2d 279 (Mass. 1982)	12

Contents

	Page
Hahn v. Planning Board of Stoughton, 403 Mass. 332, 529 N.E. 2d 1334 (Mass. 1988)	12
Montana v. United States, 440 U.S. 147 (1979)	6
Statutes Cited:	
Massachusetts General Laws, c. 211, § 3	11, 12
Massachusetts General Laws, c. 231, § 6F	10
Massachusetts General Laws, c. 231, § 6G	10, 11
Rules Cited:	
Massachusetts Rule of Appellate Procedure 27	12
Massachusetts Rule of Appellate Procedure 27.1	12
Massachusetts Rule of Civil Procedure 11	10
Supreme Court Rule 14(1)(g)(i)	5
APPENDIX	
Appendix A — Judgment Of Supreme Judicial Court For Suffolk County, Commonwealth Of Massachusetts Denying Request For Extraordinary Relief Pursuant to G.L. c. 211, § 3, *Adams v. Cumberland Farms, Inc., et al.*, And Two Related Cases, No. SJ-96-0477 Entered September 11, 1996	1a

Contents

	Page
Appendix B — M.G.L. c. 211, § 3, c. 231, §§ 6F And 6G	2a
Appendix C — Opposition To Petition For Writ Of Certiorari, *Adams, et al. v. Cumberland Farms,* Supreme Court Of The United States, No. 96-300 (Cover, PP. 1-5 And Signature Pages Only)	7a
Appendix D — Brief For The Appellants, United States Court Of Appeals For The Third Circuit, *Curley, et al. v. Cumberland Farms Dairy, Inc., et al.,* No. 93-5616 (Cover, PP. 2-3, 32 And Signature Pages Only)	14a
Appendix E — Petition For Writ Of Certiorari, *Adams, et al. v. Cumberland Farms, Inc.,* Supreme Court Of The United States, No. 96-300 (Cover, Page i And Signature Pages Only)	20a
Appendix F — Brief For Appellants, *Adams, et al. v. Cumberland Farms, Inc., et al.,* United States Court Of Appeals For The First Circuit, No. 95-1736 (Cover, Page 2 And Signature Pages Only)	23a
Appendix G — Order Of The Appeals Court For Suffolk County, Commonwealth Of Massachusetts, Affirming The Award And Judgment, *Adams v. Burke, et al.,* No. 95-J-571 Entered August 9, 1995	28a
Appendix H — Order Striking Appeal In *Adams v. Burke, et al.,* Appeals Court For Suffolk County, Commonwealth Of Massachusetts, Docket No. 95-J-571 Entered August 17, 1995	30a

Respondents request that the Court deny the petition for certiorari seeking review of a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts primarily because, as set forth below, the Massachusetts court correctly concluded that Petitioners' claims are barred by the doctrine of *res judicata.*

STATEMENT OF THE CASE

A. Procedural History

Petitioners seek review of a January 23, 1997 judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts (Petition at 13A), dismissing their appeal from an order of a single justice of that court, on September 11, 1996 (Appendix A), denying their petition for extraordinary relief under M.G.L. c. 211, § 3 (Appendix B). For purposes of proceedings before the Supreme Judicial Court, three (3) separate lawsuits by Petitioners against the Respondents were consolidated:

1. *Cheryl Adams v. Cumberland Farms, Inc., et al.* Essex Superior Court, Docket No. 91-231 (hereinafter "*Adams I*");

2. *Richard Waugh, et al. v. Haseotes, et al.* Suffolk Superior Court Docket No. 93-2663 (hereinafter "*Waugh*");

3. *Cheryl Adams v. Burke, et al.* Suffolk Superior Court Docket No. 94-0627-B (hereinafter "*Adams V*").

In addition, the Petitioners (or various combinations of them) commenced five (5) other lawsuits against the Respondents, in state and federal court in Massachusetts:

4. *Ronald Ring, et al. v. Haseotes, et al.*
   U.S.D.C. Docket No. 93-10051H
   (hereinafter "*Ring*");

5. *Lenora Spain, et al. v. Haseotes et al.*
   U.S.D.C. Docket No. 93-11725 JLT
   (hereinafter "*Spain*");

6. *Cheryl Adams, et al. v. Burke, et al.*
   U.S.D.C. Docket No. 94-10229 JLT
   (hereinafter "*Adams VI*");

7. *Eric Judson, et al. v. Cumberland Farms, Inc., et al.*
   Norfolk Superior Court Docket No. 94-12536
   (hereinafter "*Judson*");

8. *Laetitia Salvatore, et al. v. Cumberland Farms, Inc., et al.*
   U.S.D.C. Docket 95-11170-EFH
   (hereinafter "*Salvatore*").

The eight (8) lawsuits alleged essentially the same claims, arising out of the same transactions. Judgments of dismissal have entered in all (eight) 8 of these lawsuits.

B. Statement of Facts

Despite the Petitioners' assertion to the contrary (Petition at 8), the Respondents contest virtually all of the facts alleged by the Petitioners as the basis for their claims in these cases. However, because most of the Petitioners' statement of facts is

not relevant to a determination of whether certiorari should be granted, no point would be served by a rebuttal of their statement of facts, here.

The Court's attention is respectfully directed to the statement of facts and procedural history set forth at pp.1-5 of the Opposition to Petition for Writ of Certiorari in *Cheryl Adams, et al. v. Cumberland Farms, Inc.*, No. 96-300, *cert. denied*, 65 U.S.L.W. 3334 (U.S. Nov. 4, 1996), all or most of which is relevant to consideration of the Petition in this case (Appendix C).

The Petitioners are all former employees of Respondent Cumberland Farms, Inc. ("CFI"). In 1986, certain other former employees of CFI commenced suit against the company in the United States District Court for the District of New Jersey, which lawsuit was styled *Lance Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057 (SSB). The plaintiffs in *Curley*, like the Petitioners in this case, alleged injuries arising out of their employment with CFI, which they attributed to misconduct by CFI's loss prevention personnel.

In 1991, CFI filed for protection from creditors pursuant to Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of Massachusetts. *In re Cumberland Farms, Inc.*, Case No. 92-41305-JFQ.

In 1993 CFI reached an agreement with the plaintiffs in *Curley* to settle the so-called "loss prevention claims" on a class-wide basis. As part of the proposed settlement, the parties to that action filed a joint motion in the bankruptcy court requesting the creation of a mandatory class that would consist of all "loss prevention claimants." The bankruptcy court, over Petitioners' objections, granted the joint motion (Petition at 8A). Petitioners appealed this order of the bankruptcy court to the

United States District Court for the District of Massachusetts, which affirmed (Petition at 7). On May 6, 1996, the First Circuit Court of Appeals affirmed the district court's decision, *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146 (1st Cir. 1996) (Petition at 7). Petitioners sought review of that decision in this Court, which denied certiorari on November 4, 1996, *Cheryl Adams, et al. v. Cumberland Farms, Inc.*, No. 96-300 (Petition at 7).

The district court in *Curley* approved the parties' class-wide settlement in that case in a Final Order and Judgment dated September 8, 1993 (Petition at 10A - 12A). Petitioners appealed that judgment to the United States Court of Appeals for the Third Circuit, which affirmed it on May 19, 1994. *Curley v. Cumberland Farms, Inc.*, 27 F.3d 556 (3d Cir. 1994). Petitioners did not seek certiorari from that decision.

The Final Order and Judgment in *Curley* dismissed with prejudice all claims of the members of the settlement class which were or which could have been asserted in that case against CFI, its owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to the class members' employment with CFI, and enjoined the class members from instituting or prosecuting any suits against the Released Parties arising out of or related to their employment with CFI (Petition at 12A). In their brief to the Third Circuit, the Petitioners explicitly recognized that the Final Order and Judgment in *Curley* constituted an injunction against further prosecution of their claims against CFI or any of the other Released Parties, by reason of the fact that they had filed proofs of claim in the bankruptcy proceeding (Appendix D). When the district court in *Curley* subsequently issued another order *specifically* enjoining the Petitioners and their attorney, Stanley R. Cohen, from continuing to prosecute the lawsuits against Respondents which

are at issue here, the Petitioners again sought review of that order in the Third Circuit, which on January 25, 1995, denied their appeal and affirmed the injunction, *Curley v. Cumberland Farms Dairy, Inc.*, 47 F.3d 1160 (3d Cir. 1995). The Petitioners did not seek certiorari from that judgment either.

Based upon the foregoing history, the Respondents moved in the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court for dismissal of Petitioners' appeals from judgments of dismissal in *Adams I, Waugh* and *Adams V*, on grounds that Petitioners' claims in all three cases were barred as a matter of *res judicata*. After the Massachusetts Supreme Judicial Court granted Respondents' motion for dismissal, this Petition followed.

REASONS FOR DENYING THE WRIT

Petitioners have framed the issues in their Petition as involving a denial of their constitutional right to due process of law.[1] However, no constitutional rights are implicated where the state courts correctly apply the rule of *res judicata*, and that is what happened in this case. *Res judicata* also bars the Petitioners from relitigating their claim that the injunction issued by the district court in *Curley* violated the Anti-Injunction Act.

---

1. The Petition does not specify the stage in the proceedings below when the federal questions sought to be reviewed here were first raised, the manner or method in which the federal questions were raised below, or the way in which the courts below dealt with the federal questions. Supreme Court Rule 14(1)(g)(i).

I.

AS A RESULT OF THE FINAL JUDGMENT IN *CURLEY*, AND THIS COURT'S DENIAL OF CERTIORARI IN NO. 96-300, PETITIONERS' CLAIMS AGAINST THE RESPONDENTS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

The doctrine of *res judicata* states that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147 (1979). All of the elements of *res judicata* are satisfied in the instant case.

A. The Decisions Of The First And Third Circuits Are Final Decisions On The Merits Of Petitioners' Claims.

The Massachusetts district court, affirmed by the First Circuit, rejected the Petitioners' contention that the bankruptcy court lacked power to require them to participate in the class-wide settlement in *Curley*. 86 F.3d 1146 (1996). That judgment became final on November 4, 1996, when this Court denied certiorari in *Cheryl Adams, et al. v. Cumberland Farms, Inc.*, No. 96-300.

The Third Circuit rejected the Petitioner's attack on the Final Order and Judgment in *Curley*, approving the class-wide settlement of claims in that case. 27 F.3d 556 (3d Cir. 1994). That judgment became final 90 days later, on August 17, 1994, when the time for Petitioners to file a petition for writ of certiorari to this Court expired.

On May 2, 1994, the district court in *Curley* held the Petitioners and their attorney, Stanley R. Cohen, in contempt of the court's Final Order and Judgment, because *after* the

issuance of that order, they had commenced two more lawsuits against the Respondents in the state and federal courts in Massachusetts, *Adams V* and *Adams VI*. In its May 2, 1994 order, the district court specifically enjoined the Petitioners and attorney Cohen from continuing the prosecution of those lawsuits. The Third Circuit rejected the Petitioners' attack on that judgment in its January 25, 1995 decision, 47 F.3d 1160 (3d Cir. 1995), and the judgment of the district court became final 90 days later, on April 25, 1995, when the time for Petitioners to apply for a writ of certiorari to this Court expired.

B. The Petitioners And Respondents Are All Parties To The Final Order And Judgment In The *Curley* Case.

The Petitioners in this case are the same individuals who were petitioners in No. 96-300. The final judgment entered by the First Circuit in that case affirmed the order of the bankruptcy court which required the Petitioners to participate in the class-wide settlement in *Curley*. The effect of that judgment was to make all of the Petitioners parties to the *Curley* case.

The September 8, 1993 Final Order and Judgment in *Curley* dismissed with prejudice all claims of the Petitioners which were or which could have been asserted in that case against CFI, its owners, directors, officers, employees, agents, attorneys, insurers or named insureds ("the Released Parties") arising out of or in any way related to the class members' employment with CFI, and enjoined the class members from instituting or prosecuting any suits against the Released Parties arising out of or related to their employment with CFI. The Released Parties include all of the Respondents in this case.

Thus, there is complete identity of the parties as between this case and the *Curley* case.

C. Three Of The Issues Stated In The Petition Were, Or Could Have Been Litigated In The Prior Proceedings, And The Fourth Issue Is Moot.

The Petitioners have framed the issues as follows:

1. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes a state appellate court from dismissing claims against nondebtor officers and employees of a debtor corporation, for the sole reason that the claimants filed proofs of claim in the bankruptcy court which had forever barred and discharged all claims against the nondebtor officers and employees of the debtor corporation;

2. Whether the Due Process Clause and the Anti-Injunction Act preclude a Massachusetts state court from dismissing claims of plaintiffs for the reason that a federal district court in New Jersey has enjoined them from prosecuting their claims on the grounds that they were members of a mandatory non-opt out class, where they had exercised their right to exclude themselves from a Rule 23(b)(3) class action;

3. Whether the Due Process Clause precludes a Massachusetts appellate court from depriving a plaintiff, who was ordered to pay defendants $34,661.56 for filing a frivolous complaint, of her right to appeal the judgment dismissing the complaint, where the trial court ordered that the plaintiff could recover the $34,661.56 if she prevailed on appeal and a Massachusetts statute provides the right to appeal;

4. Where the Equal Protection Clause of the Fourteenth Amendment precludes a Massachusetts appellate

court from dismissing the appeal of a superior court judgment for the sole reason that a bankruptcy court has barred claims against non-debtor defendants in the lawsuit, where the debtor is not a defendant and where a Massachusetts statute provides that parties aggrieved by a decision of a superior court have the right to appeal.

Nos. 1, 2 and 4 either were, or could have been litigated in the cases which were appealed by the Petitioners to the First and Third Circuits. Thus, in No. 96-300, the Petitioners argued that the bankruptcy court lacked the power to require them to participate in the class-wide settlement approved by the district court in *Curley,* which settlement extinguished their claims against the individual Respondents (the "nondebtor defendants") (Appendix E).

In their brief to the Third Circuit in the *Curley* case, the Petitioners explicitly recognized that the Final Order and Judgment in *Curley* constituted an injunction against further prosecution of their claims against CFI or any of the other Released Parties, by reason of the fact that they had filed proofs of claim in the bankruptcy proceeding (Appendix D).

In both the First and Third Circuits, the Petitioners argued that their rights to due process of law under the United States Constitution had been violated, by the bankruptcy court and by the district court in *Curley* (Appendix D and F). In the Third Circuit, the Petitioners argued that the judgments entered against them by the district court in *Curley* violated the Anti-Injunction Act (Appendix D).

Petitioners have pursued their claims against Respondents in eight (8) separate lawsuits in the state and federal courts of Massachusetts. When Petitioners finally exhausted their challenges to the order of the bankruptcy court requiring them

to participate in the *Curley* settlement, and their challenges to the Final Order and Judgment approving that settlement, the Massachusetts Supreme Judicial Court correctly determined that further attacks by the Petitioners on those judgments were barred as a matter of *res judicata*. No constitutional rights are implicated in that determination.

The only issue raised by the Petitioners here which was not litigated either in the *Curley* case or in No. 96-300 is their claim that the Massachusetts appellate courts violated Cheryl Adams' right to due process of law, by not allowing her to appeal the judgment of $34,661.56 imposed on her and her attorney, Stanley R. Cohen, as a sanction for bringing a frivolous lawsuit (*Adams V*). The amount represents costs and attorneys' fees incurred by several of the Respondents for defending that lawsuit, and the judgment was entered by the Superior Court against Adams and Cohen jointly and severally, based upon M.G.L. c.231, § 6F (in the case of Adams) and Rule 11 of the Massachusetts Rules of Civil Procedure (in the case of Cohen).

This sanction was premised upon the fact that Adams and attorney Cohen commenced suit in *Adams V* in defiance of the Final Judgment and Order in *Curley*, which barred further prosecution of her claims against the Respondents. When Adams exhausted her challenges to the settlement in *Curley*, and to the order requiring her to participate in that settlement, her challenge to the order imposing sanctions on her for bringing a lawsuit prohibited by the terms of the final judgment in *Curley* also became moot.

Moreover, Adams' representation to this Court that she was deprived of the right to appeal the judgment imposing sanctions on her is not true. Adams did appeal that judgment, pursuant to M.G.L. c. 231, § 6G, which provides for review by a single

justice of the Appeals Court, who affirmed it, stating, *inter alia:* "It would be difficult to imagine a more unwarranted lawsuit than one commenced and pursued, as here, in willful defiance and attempted circumvention of an explicit, prohibitive court order [referring to the Final Judgment and Order in *Curley*]." (Appendix G). When Adams sought to appeal that decision to the full Appeals Court, the single justice ordered her notice of appeal stricken on the grounds that "[t]he affirmance of an award of attorneys' fees by a single justice is not appealable to the full panel pursuant to c.231, § 6G." (Appendix H). Adams subsequently filed a petition in the Supreme Judicial Court seeking review of all of the orders, rulings and judgments in *Adams V*, pursuant to M.G.L. c. 211, § 3. As set forth below, the dismissal of that petition did not implicate any constitutional rights, either.

II.

THE DISMISSAL OF PETITIONERS' APPEALS BY THE MASSACHUSETTS APPELLATE COURTS DID NOT IMPLICATE ANY CONSTITUTIONAL RIGHTS.

As a matter of Massachusetts law, a party seeking relief under G.L. c. 211, § 3 must demonstrate both a substantial claim of violation of his substantive rights, and error that cannot be remedied under the ordinary review process. *DuPont v. Superior Court*, 401 Mass. 122, 514 N.E. 2d 1086 (Mass. 1987).

> We exercise our powers under G.L. c. 211, § 3, sparingly, to prevent irreparable loss of significant rights when the normal course of trial and appeal will not provide adequate protection, or to resolve pressing, recurrent issues of proper administration of justice.

Hadfield v. Commonwealth, 387 Mass. 252, 255, n. 2, 439 N.E. 2d 279 (Mass. 1982). *See also Hahn v. Planning Board of Stoughton*, 403 Mass. 332, 529 N.E. 2d 1334, 1337 (Mass. 1988) ("The extraordinary remedy provided by c.211, § 3, should be invoked only when appellate review is otherwise unavailable"). These standards governed the appeals of all the Petitioners to the Massachusetts Supreme Judicial Court.

When the Massachusetts Appeals Court dismissed their appeals from the judgments of the Superior Court dismissing their lawsuits against Respondents, Petitioners could have filed a motion for rehearing with the Massachusetts Appeals Court, as provided in Rule 27, Mass. R. App. Procedure. *See Dunbrack v. Commonwealth*, 398 Mass. 502, 504, 498 N.E. 2d 1056, 1058 (Mass. 1986) (availability of post-conviction relief to criminal defendant justified denial of petition under c. 211, § 3). Or, Petitioners could have filed an application for further appellate review, pursuant to Rule 27.1, Mass. R. App. Procedure. *Hahn v. Planning Board of Stoughton*, 529 N.E. 2d at 1337 (affirming single justice's denial of relief under c. 211, § 3 where the plaintiff could have, and did, file an application for further appellate review of the Appeals Court's decision). Petitioners' failure to avail themselves of these alternative avenues of appeal were sufficient grounds under Massachusetts law for denial of their petitions for review, pursuant to M.G.L. c. 211, § 3.

In short, Petitioners' claim that they were denied the right to appeal by the Massachusetts courts is bogus. The Massachusetts appellate courts correctly applied Massachusetts substantive law and appellate procedures in dismissing Petitioners' appeals pursuant to M.G.L. c. 211, § 3. No constitutional rights are at stake in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PHILIP J. MOSS
Counsel of Record
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APPENDIX A — JUDGMENT OF SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY, COMMONWEALTH OF MASSACHUSETTS DENYING REQUEST FOR EXTRAORDINARY RELIEF PURSUANT TO G.L. c. 211, § 3, *ADAMS V. CUMBERLAND FARMS, INC., ET AL.*, AND TWO RELATED CASES, NO. SJ-96-0477 ENTERED SEPTEMBER 11, 1996

COMMONWEALTH OF MASSSACHUSETTS

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-96-0477

SUFFOLK, ss.

CHERYL ADAMS

vs.

CUMBERLAND FARMS, INC., et al, and two consolidated cases

JUDGMENT

On the papers, the request for extraordinary relief pursuant to G.L. c. 211, s. 3, is denied.

By the Court (Abrams, J.),

s/ [illegible]
Assistant Clerk

Entered: September 11, 1996

APPENDIX B — M.G.L. c. 211, § 3, c. 231, §§ 6F AND 6G

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases
Title I. Courts and Judicial Officers
Chapter 211. The Supreme Judicial Court

§ 3. Superintendence of inferior courts; power to issue writs and process

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy; and provided, further that general superintendence also shall not include the authority or power

to exercise or supersede any of the powers, duties and responsibilities of the chief justice for administration and management, as established by section one of chapter two hundred and eleven B, in any general or special law except under extraordinary circumstances leading to a severe, adverse impact on the administration of justice; provided, that the majority of the supreme judicial court shall issue a written order that sets forth the basis for a finding that, absent such action, there would be a severe and adverse impact on the administration of justice in the commonwealth. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases
Title II. Actions and Proceedings Therein
Chapter 231. Pleading and Practice Pleading
Damages, Interest, Costs and Expenses

§ 6F. Costs, expenses and interest for insubstantial, frivolous or bad faith claims or defenses

Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The

court shall include in such finding the specific facts and reasons on which the finding is based.

If such a finding is made with respect to a party's claims, the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims. If the party against whom such claims were asserted was not represented by counsel, the court shall award to such party an amount representing his reasonable costs, expenses and effort in defending against such claims. If such a finding is made with respect to a party's defenses, setoffs or counterclaims, the court shall award to each party against whom such defenses, setoffs or counterclaims were asserted (1) interest on the unpaid portion of the monetary claim at issue in such defense, setoff or counterclaim at one hundred and fifty per cent of the rate set in section six C from the date when the claim was due to the claimant pursuant to the substantive rules of law pertaining thereto, which date shall be stated in the award, until the claim is paid in full; and (2) an amount representing the reasonable counsel fees, costs and expenses of the claimant in prosecuting his claims or in defending against those setoffs or counterclaims found to have been wholly insubstantial, frivolous and not advanced in good faith.

Apart from any award made pursuant to the preceding paragraph, if the court finds that all or substantially all of the defenses, setoffs or counterclaims to any portion of a monetary claim made by any party who was represented by counsel during most or all of the proceeding were wholly insubstantial, frivolous and not advanced in good faith, the court shall award interest to the claimant on that portion of the claim according to the provisions of the preceding paragraph.

Appendix B

In any award made pursuant to either of the preceding paragraphs, the court shall specify in reasonable detail the method by which the amount of the award was computed and the calculation thereof.

No finding shall be made that any claim, defense, setoff or counterclaim was wholly insubstantial, frivolous and not advanced in good faith solely because a novel or unusual argument or principle of law was advanced in support thereof. No such finding shall be made in any action in which judgment was entered by default without an appearance having been entered by the defendant. The authority granted to a court by this section shall be in addition to, and not in limitation of, that already established by law.

If any parties to a civil action shall settle the dispute which was the subject thereof and shall file in the appropriate court documents setting forth such settlement, the court shall not make any finding or award pursuant to this section with respect to such parties. If an award had previously been made pursuant to this section, such award shall be vacated unless the parties shall agree otherwise.

In proceedings under this section in any action which has been heard by the medical malpractice tribunal established pursuant to section sixty B, the decision of the tribunal may be introduced as evidence relevant to whether a claim was wholly insubstantial, frivolous and not advanced in good faith.

§ 6G. Appeals; motions for expenses for insubstantial, frivolous or bad faith claims or defenses

Any party aggrieved by a decision on a motion pursuant to section six F may appeal as hereinafter provided. If the matter arises in the superior, land, housing or probate court, the

appeal shall be to the single justice of the appeals court at the next sitting thereof. If the matter arises in the appeals court or before a single justice of the supreme judicial court, the appeal shall be to the full bench of the supreme judicial court. The court deciding the appeal shall review the finding and award, if any, appealed from as if it were initially deciding the matter, and may withdraw or amend any finding or reduce or rescind any award when in its judgment the facts so warrant.

Any party may file a notice of appeal with the clerk or register of the court hearing the motion within ten days after receiving notice of the decision thereon. The clerk or register shall then forward the motion, the court's findings and award, and any other documents relevant to the appeal to the clerk of the court deciding the appeal who, upon receipt thereof, shall refer the matter to the court for speedy decision and shall notify the parties of such decision, which shall be final. Any appeal to the supreme judicial court or the appeals court shall proceed according to the Massachusetts Rules of Appellate Procedure; any appeal to a single justice of the Appeals Court shall proceed under the rules for the regulation of practice before a single justice of that court. The payment of any award made pursuant to section six F shall be stayed until the completion of all appeals relating to the civil action in which the award was made.

APPENDIX C — OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, *ADAMS, ET AL. V. CUMBERLAND FARMS*, SUPREME COURT OF THE UNITED STATES, NO. 96-300 (COVER, PP. 1-5 AND SIGNATURE PAGES ONLY)

No. 96-300

In The

Supreme Court of the United States

October Term, 1995

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE and MELISSA SMITH RAPA,
Petitioners,

vs.

CUMBERLAND FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Appendix C

[1] Respondent requests that the Court deny the petition for certiorari seeking review of a judgment of the United States Court of Appeals for the First Circuit primarily because, as set forth below, even if the Court were to grant certiorari and on the merits rule in favor of Petitioners, Petitioners' claims are moot.

STATEMENT OF THE CASE

A. Procedural History

Petitioners seek a review of the May 6, 1996 decision of the United States Court of Appeals for the First Circuit (Petition at Appendix A) affirming the June 7, 1995 order of the United States District Court for the District of Massachusetts (Petition at Appendix B) which, acting as an appellate court, affirmed the August 30, 1993 order of the United States Bankruptcy Court for the District of Massachusetts (Petition at Appendix C). In its August 30 order, the bankruptcy court approved a non-opt out settlement class consisting of 273 former employees of Respondent ("*Loss Prevention Claimants*"), including Petitioners, and approved a mechanism whereby a class-wide settlement of their claims would be submitted to the United States District Court for the District of New Jersey where fourteen (14) of Respondent's former employees had a lawsuit pending in a case styled *Lance Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057 (SSB).

In 1993 CFI reached an agreement in *Curley* to settle the so-called loss prevention claims on a class-wide basis. As part of the proposed *Curley* settlement, the parties to that action filed a joint motion in the bankruptcy court requesting the creation of a mandatory class that would consist of all Loss Prevention Claimants. The bankruptcy court, over Petitioners' objections, granted the joint motion. (Petition at 12A-13A). Petitioners appealed and the district court affirmed. (Petition at

Appendix C

[2] 11A). The court of appeals affirmed the district court's decision. (Petition at 1A-10A).

The Court in *Curley* ultimately approved the class settlement which provided for an opt-out class for those individuals who had not filed proofs of claim in Respondent's bankruptcy and a mandatory class consisting of those who had filed such proofs of claim. (Petition at 14A-16A). Petitioners' appealed that order; the United States Court of Appeals for the Third Circuit affirmed. *See Curley v. Cumberland Farms, Inc.*, 27 F.3d 556 (3d Cir. 1994).

B. Statement of Facts

The opinion of the court of appeals correctly sets forth the facts in this case. Petitioners' statement of facts (much of which is not relevant to a determination of whether certiorari should be granted) omits several material facts. Before the filing of Respondent Cumberland Farms, Inc.'s ("*CFI*") bankruptcy petition, Petitioner Cheryl Adams, individually, and after the filing of CFI's bankruptcy petition, in connection with numerous others — including the ten other Petitioners, filed various actions against CFI and/or its officers, directors, shareholders, employees and agents as well as a number of public officials both in Federal and Massachusetts state courts. The gravamen of Petitioners' claims was that CFI and various individuals employed by CFI extorted money from low level CFI employees by extracting false confessions of theft on threats of criminal prosecution, public exposure and the like. The claims asserted included false imprisonment, wrongful termination, malicious prosecution, abuse of process, defamation, intentional infliction of emotional distress, violation of Massachusetts civil rights laws and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 42 U.S.C. § 1962(c) and (d). A summary of

the cases [3] relevant to an understanding why certiorari should not be granted are set forth below.

(1) *Adams I*: The first of the lawsuits, *Adams v. Cumberland Farms, Inc., et al.* was commenced by Petitioner Cheryl Adams in Essex County Superior Court, No. 91-231, but because she asserted a claim under RICO, the defendants removed the case to the United States District Court for the District of Massachusetts, No. 91-10627-S. After the District Court dismissed Adams' RICO count, the case was remanded to state court where is was subsequently consolidated with *Waugh*, discussed below. (Appendix A at 3a).

(2) *Ring*: Following Cheryl Adams' unsuccessful attempts to amend the complaint and to obtain class certification in *Adams I*, Petitioners commenced a second action, *Ring, et al. v. Cumberland Farms, Inc., et al.* in the United States District Court for the District of Massachusetts, Civil Action No. 93-10051-H. That complaint, asserted the same claims as set forth in *Adams I*, including a virtually identical RICO claim. *Ring* was dismissed and no appeal was taken from the order of dismissal. (Appendix A at 3a-4a).

(3) *Waugh*: Subsequently, a third action, *Waugh, et al. v. Haseotes, et al.*, was filed in state court but removed to the United States District Court for the District of Massachusetts where it was assigned to Judge Harrington, the judge who had dismissed *Ring*. Before Judge Harrington could rule on the defendants' motion to dismiss, the *Waugh* plaintiffs voluntarily dismissed their federal claims. The case was remanded to state court where it was consolidated with *Adams I*. The consolidated action has been dismissed by the superior court (Appendix B at 9a). The Massachusetts Appeals Court affirmed the dismissal. (Appendix C at 14a). The Massachusetts Supreme Judicial Court denied the *Waugh* plaintiffs' petition for extraordinary relief. (Appendix D at 15a).

Appendix C

[4] (4) *Spain*: After the dismissal of *Ring* and while *Adams I* and *Waugh* were pending in state court, Petitioners, along with others, commenced yet another action, *Spain, et al. v. Haseotes, et al.* in the United District Court for the District of Massachusetts, Civil Action No. 93-11725-NF. This action was virtually identical to its predecessors and was dismissed, along with two other actions filed by Petitioners' attorney, in its entirety. (Appendix A at 4a).

Also relevant is the conduct of Stanley R. Cohen, Petitioners' attorney of record in all these actions. As articulated by Judge Tauro

> *Spain* was the fourth in the series brought by Attorney Cohen. As noted above, all four complaints presented essentially the same claims on behalf of shifting groups of Cohen's Plaintiffs. By the time *Spain* was filed, the RICO and ERISA claims of twelve of the Plaintiffs had already been adjudicated and dismissed in two cases, *Adams I* and *Ring*. *See Spain*, Memorandum and Order April 25, 1995. In an effort to distinguish the claims from those already dismissed, Attorney Cohen added allegations against the Defendants' attorneys. This court and others have found that he had no evidence to support these claims. *Spain*, April 25, 1995; *Adams v. Mass. Sup. Ct.*, Docket No. 94-0627, June 8, 1995. The claims of the other Plaintiffs were either barred by applicable statutes of limitation or were otherwise defective for the same reasons as those in *Adams I* and *Ring*. [Appendix A at 5a-6a].

[5] Moreover, Judge Tauro went on to conclude that the conduct of Stanley R. Cohen

> in these matters have [sic] resulted in his being sanctioned and/or held in contempt five times by two courts.[1] The District of New Jersey held Cohen in civil contempt on two occasions, May 4, 1994 (specifically enjoining Cohen and his plaintiffs from prosecuting *Waugh*, *Spain*, and the three other *Adams*) cases and on July 19, 1995, for directly violating its orders. The Superior Court for Suffolk County, Commonwealth of Massachusetts has sanctioned Cohen[2] three times, August 10, 1994, August 29, 1994 and July 12, 1995. [Appendix A at 5a].

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' CLAIM ARE MOOT.

Although Petitioners' conduct, and that of their attorney, suggests that they will continue to commence lawsuits regarding their loss prevention claims, all such claims are moot. Their federal claims were dismissed in *Ring*, as well as in other . . . .

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1. In reality Attorney Cohen had been sanctioned by three courts. Judge Tauro's decision failed to include the bankruptcy court's order of April 21, 1994 holding Attorney Cohen in contempt.

2. In addition the Superior Court for Suffolk County also sanctioned Cheryl Adams individually.

Appendix C

[10] V.

WHETHER THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN FASHIONING THE ESTIMATION PROCEEDING USED TO FIX THE PETITIONERS' CLAIMS DOES NOT JUSTIFY REVIEW BY THIS COURT.

As a court of law this Court ordinarily does not undertake to correct errors of fact or abuse of discretion. *Cf. Graver Tank and Mfg. Co. v. Linde Products Co.*, 336 U.S. 271, 275 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part and reversed in part*, 339 U.S. 605 (1950).

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX D — BRIEF FOR THE APPELLANTS, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, *CURLEY, ET AL. V. CUMBERLAND FARMS DAIRY, INC., ET AL.*, NO. 93-5616 (COVER, PP. 2-3, 32 AND SIGNATURE PAGES ONLY)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5616

LANCE CURLEY; FRANCES BILBROUGH; PHILOMENA TAGLIAFERRO; JAMES MCCABE; JUDITH DIPASQUALE; ALBERT COX; KIMBERLY A. DEBIASE; BETTY BAYER; ADELE FRIEDMAN; ROBIN GRUNER; DENISE CAPNER; NORMAN BOGUSLAV, all individually and on behalf of others similarly situated,

Plaintiffs

v.

CUMBERLAND FARMS DAIRY, INC.; D. B. HASEOTES; GEORGE HASEOTES; BYRON HASEOTES; JAMES M. MUMMA; DANIEL E. PHANEUF; R. THOMAS FRACCOLA; CAROL A. FORMAN; RICHARD A. BINDER; ARTHUR L. GORDON; CUMBERLAND FARMS, INC.; LILY H. BENTAS; FRANCIS N. ALGER; COLLEEN WALSH NASH; GEORGE WALSH; RONALD SAUMUR, both individually and as the representative of every other Cumberland Farms "Loss Prevention Specialist",

Defendants

CHERYL ADAMS, RONALD RING, RICHARD WAUGH, BRENT ADAMS, CARRIE BURKE, PATRICIA ADAMS,

Appendix D

ELIZABETH TARGEE, MELISSA SMITH RAPA, ROBERT RAVITZ, NANCY FRENCH, WELDON ADAMS, TINA LEVESQUE, WILLIAM CONNORS, and MATTHEW VAN WINKLE,

Appellants

BRIEF FOR THE APPELLANTS
ON APPEAL FROM THE

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

Stanley R. Cohen
230 Broadway, Suite 104
Lynnfield, MA 01940

Dated: November 1993

[2] section 1965(a), and pendent jurisdiction for their other claims.

STATEMENT OF ISSUES

I. Whether the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution prohibits the denial of access to the courts to litigate their claims to class members who filed proofs of claim in the Bankruptcy Court.

II. Whether equal protection of the laws guaranteed by the United States Constitution is denied to class members who are

prohibited from opting out of the class for the sole reason that they filed proofs of claim in the Bankruptcy Court.

III. Whether a trial court could deny a motion to intervene brought by members of a settlement class when the settlement provided that the applicants for intervention would be prohibited from opting out of the settlement class and would be required to abandon all their claims forever.

IV. Whether a court abuses its discretion in denying a motion for the creation of plaintiff subclasses, when the plaintiff class representatives agree to a settlement where the defendants admit no wrongdoing, and the primary objective of the class members seeking creation of the subclass is the clearance of their name.

V. Whether the best notice practicable under the circumstances was provided to class members in Massachusetts, Maine, New Hampshire, Vermont, New York, Rhode Island, and Connecticut by mailing a notice to addresses which were from 3 to 23 years old, and by publishing on page 63 of the August 6, 1993 [3] Boston Globe the notice to reach all class members in those seven states not receiving the mailed notice.

VI. Whether plaintiff class representatives fairly and adequately protect the interests of the class when they do not include class members in negotiations; when they do not apprise class members of the individual defendants' net worth and ability to contribute to a settlement fund; and when they agree to allow individual defendants who contribute nothing to a settlement fund to be released from all liability.

Appendix D

VII. Whether the Anti-Injunction Act is violated by a district court which requires all members of a class who filed proofs of claim in a bankruptcy court to participate as members of the class and prevents them from prosecuting actions they have previously filed.

STATEMENT OF CASE

Plaintiffs, former employees of Cumberland, filed a class action suit in the United States District Court for the District of New Jersey, *Curley, et al. v. Cumberland Farms, Inc., et al.*, No. 86-5057, in December of 1986. They claimed that the defendant Cumberland and officers and employees of Cumberland carried out a scheme by which low level employees were wrongfully charged with stealing money and merchandise from Cumberland's stores. Plaintiffs alleged that they were coerced into signing confessions through threats, including arrest and notification of other employers.

On April 15, 1987, before defendants filed an answer,. . . .

[32] V. THE ANTI-INJUNCTION ACT, 28 U.S.C. SECTION 2283, PROHIBITS THE TRIAL COURT FROM REQUIRING BANKRUPTCY COURT LOSS PREVENTION CLAIMANTS TO BE MEMBERS OF THE SETTLEMENT CLASS, PREVENTING THEM FROM PROSECUTING ACTIONS ALREADY FILED IN OTHER COURTS AGAINST THE DEFENDANTS.

The trial court's Order Respecting Supplemental Notice to Curley Class Members Who Filed Proofs of Claim in the Bankruptcy Court required all class members who filed proofs of claim against Cumberland to be members of the *Curley* class.

Curley class members, having released all defendants from all liability, may not prosecute any of their claims. The trial court's Order thus constitutes an injunction to stay proceedings. *Avery v. Secretary of Health and Human Services*, 762 F.2d 158, 160 (1st Cir. 1985). The *Curley* Court is prohibited from issuing such an order by 28 U.S.C. section 2283, the Anti-Injunction Act. Section 2283 states that a court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, where necessary in aid of its jurisdiction or to protect or effectuate its judgements. Congress has authorized no such act. The *Curley* Court has no need for such injunction for any purpose. The United States Supreme Court has construed the Act to forbid a federal court from barring parties from prosecuting state court actions such as the *Adams* and *Waugh* cases. *Atlantic Coast R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287-88, 90 S.Ct. 1739, 1743-44, 26 L.Ed.2d 234 (1970).

[33] CONCLUSION

For the reasons cited above, the Applicants for Intervention-Appellants, Cheryl Adams, Ronald Ring, Richard Waugh, Brent Adams, Carrie Burke, Patricia Adams, Elizabeth Targee, Melissa Smith Rapa, Robert Ravitz, Nancy French, Weldon Adams, Tina Levesque, William Connors, and Matthew Van Winkle respectfully request that this Court vacate the Order of the United States District Court for the District of New Jersey denying their Motion to Intervene as Plaintiffs, to Order That Appropriate Notice Be Provided Putative Class Members and to Order the Ascertainment of the Defendants' Net Worth; the Final Order and Judgment; and the Order Respecting Supplemental Notice

Appendix D

to Curley Class Members Who Filed Proofs of Claim in the Bankruptcy Court.

Dated: 11/22/93

Respectfully submitted,
Attorney for Appellants,

s/ Stanley R. Cohen
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APPENDIX E — PETITION FOR WRIT OF CERTIORARI, *ADAMS, ET AL. V. CUMBERLAND FARMS, INC.*, SUPREME COURT OF THE UNITED STATES, NO. 96-300 (COVER, PAGE 1 AND SIGNATURE PAGES ONLY)

No.

In The

Supreme Court of the United States

October Term, 1996

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE and MELISSA SMITH RAPA,
Petitioners,

v.

CUMBERLAND FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioners

Appendix E

[i] QUESTIONS PRESENTED

1. Whether the petitioners, solely as a result of filing proofs of claim in a bankruptcy court, can be denied their Seventh Amendment right to a jury trial for determination of their legal tort claims which were filed in a state court against the respondent before the respondent filed its bankruptcy petition.

2. Whether the petitioners' claims for defamation, false imprisonment, malicious prosecution, and violation of the Massachusetts Civil Rights Act constitute: 1) core bankruptcy proceedings; and 2) personal injury tort claims within the meaning of 28 U.S.C. § 157(b)(5), and had to be determined in the district court in which the bankruptcy was pending or in the district court in which the claims arose.

3. Whether petitioners could waive the bankruptcy court's lack of subject matter jurisdiction by failing to challenge early.

4. Whether the bankruptcy court had the authority to forever bar and discharge all claims that the petitioners brought or could have brought against nondebtor defendants after the automatic stay had been vacated with respect to the nondebtor defendants.

5. Whether the Due Process Clause of the Fifth Amendment precluded the bankruptcy court from ordering the petitioners to be members of a non-opt out settlement class in a New Jersey Rule 23(b)(3) class action, in which the petitioners were never parties, their motion to intervene as plaintiffs had been denied, and they had excluded themselves, thereby having a district court in New Jersey estimate the petitioners' claims which arose in Massachusetts and were brought in Massachusetts. . . . .

Appendix E

[14] CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX F — BRIEF FOR APPELLANTS, *ADAMS, ET AL. V. CUMBERLAND FARMS, INC., ET AL.*, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, NO. 95-1736 (COVER, PAGE 2 AND SIGNATURE PAGES ONLY)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 95-1736

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,

Appellants

v.

CUMBERLAND FARMS, INC. and LANCE CURLEY, et al.,

Appellees

BRIEF FOR APPELLANTS

On Appeal from
the United States District Court
for the District of Massachusetts

Stanley R. Cohen
BBO# 554486
230 Broadway, Suite 104
Lynnfield, MA 01940
(617) 581-3001

Dated: August 1995

Appendix F

[2] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE PERSONAL INJURY TORT CLAIMS FOR FALSE IMPRISONMENT, DEFAMATION, VIOLATION OF CIVIL RIGHTS, MALICIOUS ABUSE OF PROCESS, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND VIOLATIONS OF THE RICO ACT, WHICH CONSTITUTED THE BANKRUPTCY COURT PROOF OF CLAIMS OF CHERYL ADAMS AND TEN OTHER FORMER EMPLOYEES OF THE DEBTOR, CUMBERLAND FARMS, INC., WERE NON-CORE PROCEEDINGS WHICH COULD NOT BE DETERMINED BY A BANKRUPTCY COURT.

II. WHETHER THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS HAD THE POWER TO DETERMINE THE PERSONAL INJURY TORT CLAIMS OF THE ELEVEN ADAMS CLAIMANTS BY REQUIRING THEM TO BE MEMBERS OF A MANDATORY, NON-OPT OUT CLASS IN A NEW JERSEY FEDERAL DISTRICT COURT.

III. WHETHER THE BANKRUPTCY COURT ERRED IN ALLOWING THE CLASS PROOFS OF CLAIM FILED ON BEHALF OF LANCE CURLEY, ET AL. AND PATRICIA BENEFIELD, ET AL., RESOLVING THE LOSS PREVENTION CLAIMS ON A CLASS-WIDE BASIS, WHILE DENYING THE MOTION OF THE ADAMS CLAIMANTS TO APPLY RULES 9014 AND 7023 TO THEIR CLASS PROOFS OF CLAIM.

Appendix F

IV. WHETHER FORMER EMPLOYEES OF CUMBERLAND FARMS, INC., SOLELY AS A RESULT OF FILING PROOFS OF CLAIM IN A BANKRUPTCY COURT, CAN BE DENIED THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL AND THEIR RIGHTS TO DUE PROCESS, BY REQUIRING THEM TO BE MEMBERS OF THE RULE 23(b)(3) *CURLEY* CLASS, AND BE BARRED FOREVER FROM PROSECUTING THEIR CLAIMS AGAINST NONDEBTORS AS WELL AS AGAINST THE DEBTOR.

V. WHETHER THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS ERRED IN TRANSFERRING THE PERSONAL INJURY TORT CLAIMS OF THE ADAMS CLAIMANTS, WHICH AROSE IN MASSACHUSETTS, TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY; RATHER THAN TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

STATEMENT OF THE CASE

NATURE OF THE CASE

Former employees of the Debtor, Cumberland Farms, Inc., seek vindication for themselves and on behalf of thousands of other victims. They allege the Debtor's officers and employees: 1) conspired to make up for inventory losses by accusing employees of stealing money and merchandise from CFI's stores; 2) without . . .

* * *

[17] 864 (1stCir.1982). A mandatory non-opt out class should not have been ordered where it has not been shown that the assets of CFI and the individual defendants are finite. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2nd Cir. 1992).

4. Barring the Adams Claimants — forever — from having their claims against all the alleged wrongdoers adjudicated and from clearing their names and vindicating themselves, deprives them of liberty and property interests and violates the Due Process Clause.

The August 30, 1993 Order of the bankruptcy court deprived the Adams Claimants of their rights to procedural due process. They lost forever their right to clear their names, a liberty interest; they lost forever their right to vindicate themselves and recover damages, a property interest. *Little v. Streater*, 452 U.S. 1, 2, 101 S.Ct. 2202, 2203, 68 L.Ed.2d 627 (1981).

CONCLUSION

For the reasons cited above, the Claimants/Appellants respectfully request that this Court vacate the Order of the U.S. Bankruptcy Court for the District of Massachusetts which approved a non-opt out settlement class in *Curley v. CFI*, U.S. District Court for the District of New Jersey, No. 86-5057 (SSB),

consisting of former CFI employees who filed proofs of claim in the bankruptcy court.

Dated: _____

Respectfully submitted,
ADAMS CLAIMANTS/APPELLANTS
By their attorney,

Stanley R. Cohen, BBO# 554486
230 Broadway, Suite 104
Lynnfield, MA 01940
(617) 581-3001

APPENDIX G — ORDER OF THE APPEALS COURT FOR SUFFOLK COUNTY, COMMONWEALTH OF MASSACHUSETTS, AFFIRMING THE AWARD AND JUDGMENT, *ADAMS V. BURKE, ET AL.*, NO. 95-J-571 ENTERED AUGUST 9, 1995

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

95-J-571

CHERYL ADAMS

v.

KEVIN BURKE & OTHERS.[1]

This is an appeal by the plaintiff below, Cheryl Adams, pursuant to G. L. c. 231, § 6G, from a July 17, 1995, judgment of a judge of the Superior Court awarding attorney's fees and costs against her under G. L. c. 231, § 6F. The judge concluded that Adams was jointly liable, with her attorney,[2] for having knowingly maintained a wholly insubstantial and frivolous action against the defendants in bad faith.[3] After reviewing the papers submitted in support of and in opposition to the appeal,

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1. The judgment appealed from and the notice of appeal identify the lead defendant as Cumberland Farms, Inc.

2. Adams' attorney also purported to appeal from the judgment awarding attorneys' fees and costs against him and Adams, jointly and severally. His appeal is, however, ineffective. The single justice has jurisdiction under G. L. c. 231, § 6G, to entertain only appeals by an aggrieved "party" who was a "party in a[] civil action," G. L. c. 231, § 6F, whose claims were determined by the trial court to be frivolous and not advanced in good faith. Adams' attorney is not such a "party."

3. The appeal does not challenge the reasonableness of the fees and costs awarded.

and without the necessity of a hearing, I *affirm* the award and judgment. I do so substantially on the basis of the judge's June 8, 1995 findings, rulings and order on a motion to dismiss and for attorney's fees as well as his June 12, 1995, findings assessing attorneys' fees and order for judgment, as amplified by the arguments set forth in the defendants' opposition to the appeal.

It would be difficult to imagine a more unwarranted lawsuit than one commenced and pursued, as here, in willful defiance and attempted circumvention of an explicit, prohibitive court order. Additional cause for censure arises from the facts that the suit's claims either were identical to four earlier actions or were conceded (to the extent facially different) to have been without foundation (by the voluntary dismissal thereof and inability to produce factual support therefor in response to the judge's request). The memorandum and materials in support of this appeal fail to identify, let alone demonstrate, any defect in the judge's findings that Adams knew that her claims against the defendants (other than Cumberland Farms) were baseless and knew that she had been enjoined from prosecuting this very action. Her unjustified failure to appear at the July 11, 1995, hearing to explain her position, despite the judge's express and commendable invitation to do so, is eloquent testimony to the absence of any good faith justification for the fact and the extravagant allegations of her complaint.[4]

By the Court (Laurence, J.),

s/ Lena M. Wong
Assistant Clerk

Entered: August 9, 1995.

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4. This order is not intended to convey any opinion regarding the merits of Adams' original grievance against Cumberland Farms, Inc. The righteousness of one's cause does not, however, sanction reckless or unjustified litigation or allegations in attempted vindication thereof.

APPENDIX H — ORDER STRIKING APPEAL IN *ADAMS V. BURKE, ET AL.*, APPEALS COURT FOR SUFFOLK COUNTY, COMMONWEALTH OF MASSACHUSETTS, DOCKET NO. 95-J-571 ENTERED AUGUST 17, 1995

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 95-J-571

SUFFOLK, ss.

Superior Court
Civil Action
Docket No. 94-0627

CHERYL ADAMS,

Plaintiff

v.

KEVIN BURKE, et al.,

Defendants

NOTICE OF APPEAL

Now comes Cheryl Adams, plaintiff-appellant in the matter captioned above, being aggrieved by this Court's Order of August 9, 1995 affirming an award and judgement pursuant to G.L. c. 231, Section 6F, hereby gives notice of her appeal.

Dated: 8/14/95

Respectfully submitted,
CHERYL ADAMS
By her attorney,

s/ Stanley R. Cohen
Stanley R. Cohen, BBO# 554486
230 Broadway, Suite 104
Lynnfield, MA 01940
(617) 581-3001

Appendix H

[handwritten]

Appeals Court

The within is stricken as the affirmance of an award of attorney's fees by a single justice is not appealable to the full panel pursuant to c. 231, § 6G.

Laurence, J.

Entered: 8/17/95

Attest: s/ Lena M. Wong
Asst. Clerk